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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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No. 47718-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BATTLE GROUND CINEMA, LLC, a Washington limited liability company,

Plaintiff-Appellant,

v.

ROBERT BERNHARDT and KAREN BERNHARDT, a married couple; CHARLES MULLIGAN, an individual; SAMUEL WALKER and SHELLEY WALKER, as Trustees of the WALKER FAMILY TRUST, a California trust; CHRISTOPHER WALKER and LARA EVANS-WALKER, a married couple; and SAMUEL WALKER, as Trustee of the JTW TRUST, a California trust,

Defendants-Respondents.

SAMUEL WALKER AND SHELLEY WALKER, as trustees of the WALKER FAMILY TRUST, a California trust; CHRISTOPHER AND LAURA EVANS-WALKER, a married couple; JOSEPH WALKER, as trustee of the JTW TRUST, a California trust; ROBERT AND KAREN BERNHARDT, a married couple; and CHARLES MULLIGAN, an individual,

Plaintiffs-Respondents,

v.

ELIE G. KASSAB, an individual; THE GARDNER CENTER, LLC, a Washington limited liability company; and BATTLE GROUND CINEMA, LLC, a Washington limited liability company,

Defendants-Appellants.

REPLY BRIEF OF APPELLANTS

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Reply to Restatement of the Case

Walker Parties' restatement of the case asserts as facts, things which appear designed to accomplish two things, neither of which are useful in deciding the issues in this case:

1. To make the case appear more complex than it is to justify the exorbitant fees awarded; and
2. To smear Elie Kassab to bias the reader.

None of the issues in this case requires this Court to determine what facts the Superior Court found on summary judgment because the Superior Court made no findings of fact on summary judgment (CP 7917-7918; 9574;[1] 5-22-2015 RP 12, ll. 15-16).

There is no issue for review here of the Superior Court's nonexistent "conclusion" on summary judgment that the third page of the guaranty was forged (Resp.Br. p. 4, issue 1) because the Superior Court made no such conclusion on summary judgment.

We adhere to the statement of the case on BCG Parties' Opening Brief ("App.Br.") and reiterate that the fraud and forgery allegations against Elie

[1] The opinion and order stated, "The summary judgment procedure only allows the court to determine whether there are or are not "genuine issue as to any material fact." CR 56(c). The Court cannot make findings of the facts on the merits of the underlying case because the Court granted summary judgment and the disposition of the claims necessarily did not involve determinations of fact. It would be improper for the Court to make findings of fact on the merits of the underlying case where the facts of the underlying case were not fully litigated."

Kassab were never found by the Superior Court or proven. They were not the subject of an evidentiary hearing. The allegations of fraud and forgery were not necessary to the summary judgments. Those allegations were not at issue at summary judgment on the breach of lease claims. The summary judgment on the declaratory judgment could just as well have been based on the lack of evidence that Walker Parties ever saw the third page at the time of their purchase of the Gardner Center. Therefore, whether the fabled third page was genuine or not, it was not part of the contract.[2]

The supposed facts, where not supported by an express finding, should be disregarded. This Court should disregard evidence, recited as if they were found facts (e.g., Resp.Br. 6, 7-8, 23 fn. 4), of Mr. Kassab's prior leases and dealings.[3] This Court should also disregard the asserted facts which are mis-cited to the Clerk's Record. The record cites which do not support the fact asserted are collected in Appendix 1.

Walker Parties devote more than three pages of brief to the argument "The personal guaranty's purported third page is shown to be a forgery" (Resp.Br., p. 13-17). Nowhere do they point to a finding that anything was

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[2] In fact, if the summary judgment had been based on fraud or forgery, it was improper due to the diametrically opposing evidence in the record on those points.

[3] This evidence is inadmissible because no such facts were found, they are irrelevant and they are too dissimilar from anything in this case to make them admissible under ER 404. For example, the other lease guarantees were only 5 years (CP 2695-2696, 4043, 4046).

a forgery, who forged anything or when it was forged. Instead they argue evidence as if it were a fact. This is not a statement of facts and does not belong here. There are other explanations for the missing third page, but none of that is relevant. We have chosen not to appeal the declaratory judgment entered by the Court on summary judgment.

Reply to Argument

A. Fraud and Forgery Not Found on Summary Judgment

1. Evidentiary Hearing Not an Issue; Not Waived

Walker Parties' argument on this issue misstates the facts, the law, and the argument made by BGC Parties in the opening brief. BGC Parties have not raised an assignment of error that the Superior Court should have held a hearing on fraud or forgery. We do not seek such a hearing on remand. Nevertheless, Walker Parties argue that issue as if it was a preservation issue. This is a not an issue at all.

What we did argue is that the Superior Court should not have relied on fraud or forgery as if they were established facts when there had been no trial or evidentiary hearing in which fraud or forgery had been found by the Court (App.Br., p. 46).

In response, the Walker Parties argue that BGC Parties made no attempt to request an evidentiary hearing, as if such a request is necessary (Resp.Br.,

p. 22-24). If Walker Parties wished to prove fraud or forgery, it was incumbent on them to put on evidence and request those findings in a procedure which allowed determination of contested facts. Summary judgment is not such a procedure. CR 56.

Even if there was a requirement that BGC Parties request an evidentiary hearing, we did so on summary judgment. When the defense to a summary judgment motion argues that there are genuine issues of fact for trial, it is arguing that a trial (or evidentiary hearing) is needed. BGC Parties' entire opposition brief on summary judgment argued that there are genuine issues of fact and clearly stated that a trial was needed (CP 4578-89). Specifically, BGC Parties' briefing (CP 4581-83 & 4585-86 (witness testimony contrary to Walker Parties' alleged facts); CP 4585 ("[T]hese disputed factual issues require a full trial"); CP 4587, fn 8 ("...Plaintiffs cannot establish the third page to be a fraud or a forgery as a matter of law"); CP 4589 ("Plaintiffs have themselves demonstrated that there is a triable issue of fact here through their long discussions of conflicting evidence"); CP 4589 ("It is obvious that the facts before the Court are disputed, and thereby create genuine issues that cannot be resolved without a trial"(emphasis in original)).

The cases cited by the Walker Parties do not support their argument. Neither *Hartley* nor *Leen* concerned summary judgment motions. *State of*

Washington v. Hartley, 51 Wn. App. 442, 754 P.2d 131 (1988)(Criminal defendant did not request evidentiary hearing at the sentencing hearing); *Leen v. Demopolis*, 62 Wn. App. 473, 815 P.2d 269 (1991)(Defendant failed to appear at hearing, so waived factual dispute).

The *Parkin* case also does not support the Walker Parties' argument. *Parkin v. Colocousis, et al.*, 53 Wn. App. 649, 769 P.2d 326 (1989). Walker Parties claim that *Parkin* stands for the proposition that "failing to object to an affidavit in the trial court on summary judgment waives the issue on appeal." (Resp.Br., p. 23). Instead, the case held the opposite – that the appellate court could determine if the affidavit contained admissible evidence.

Were it necessary, BGC Parties preserved the issue that fraud and forgery presented genuine issues of fact that required a trial. But the real issue is that the Superior Court never made a finding of fraud or forgery after an evidentiary hearing and cannot rely on facts not found after an evidentiary hearing on that question.

2. No Fraud or Forgery Found on Summary Judgment

The Superior Court ruled in its opinion and order "It would be improper for the Court to make findings of fact on the merits of the underlying case where the facts of the underlying case were not fully litigated" (CP 9574). "THE COURT: Yeah, I don't make findings on summary judgments" (5-22-

2015 RP 12, ll. 15-16).

As the Superior Court noted (CP 9574), findings of fact are improper on summary judgment (5-22-2015 RP 12, ll. 15-21). CR 52(a)(5)(B); *Zempel v. Twitchell*, 59 Wn.2d 419, 425, 367 P.2d 985 (1962).

The function of a summary judgment proceeding is to determine whether genuine issues of fact exist, not to determine issues of fact. *Id.* Findings and conclusions concerning substantive fact are unnecessary on motions for summary judgment and their absence cannot prejudice the prevailing party in any way. *Id.*; CR 52(a)(5)(B). If made, such findings and conclusions are superfluous and are not considered by the appellate court. *Donald v. City of Vancouver*, 43 Wn. App. 880, 719 P.2d 966 (1986); *Wash. Optometric Ass'n v. Pierce County*, 73 Wn.2d 445, 448, 438 P.2d 861 (1968); *Duckworth v. Bonney Lake*, 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978). Concern with findings and conclusions on summary judgment is a waste of time. *Donald,* 43 Wn. App. 880 at fn. 2.

Walker Parties' argument that the Superior Court found facts such as fraud or forgery are contradicted by the record.

B. Disputed Material Facts Precluded Summary Judgment on BGC's[4] Breach of Lease Claims

1. Overcharges Claim Not Waived

Walker Parties argue that BGC[5] waived its claim for overcharges (the second claim) by failing to argue it on opening brief (Resp.Br. at 24-25). But the summary judgment on both claims was appealed and argued.

BGC alleged two claims for breach of the lease in its second amended complaint (CP 2231-2234). The two claims are intertwined. The first claim alleges that Walker Parties failed to maintain the common areas as required by the lease, and seeks damages and a declaratory judgment. The second claim realleges the first claim and alleges that Walker Parties overcharged for common area maintenance. The second claim seeks an accounting and declaratory judgment. Both claims are based on exactly the same facts – the failure to perform maintenance to the common areas. One seeks damages for injury to property from maintenance not performed and the second seeks relief from being charged for the same maintenance not performed.

BGC argued that genuine issues of fact in the summary judgment record precluded summary judgment on the allegations of failure to maintain (App.Br., p. 13-15). Those allegations are common to, and the basis of both

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[4] The Cinema is the only one of BGC parties which is a plaintiff in the breach of lease case.

[5] Walker Parties refer to the plaintiff in the lease case as "Kassab" but he is not a party to that case.

claims. BGC argued that the law makes the landlord responsible for maintenance of the common areas and at fn. 11 quotes the lease provision requiring BGC to pay its pro-rata share of the common area maintenance charges. (App.Br., p. 16). Finally, BGC argued that section 6.5 of the lease did not waive BGC's contract claims – plural (App.Br., p. 17). All of these arguments apply equally to both of BGC's breach of lease claims. Walker Parties' argument is wrong.

2. The Lease Required Maintenance of Common Areas

Respondent's brief, page 25, says, "On appeal, Kassab points to no lease provision requiring the Owners to maintain the common areas."[6] But App.Br., p. 16, cites section 3.2(1) and quotes it in fn. 11. Walker Parties cannot explain how it is that they are not required to perform maintenance when the lease requires the tenant to pay for maintenance and BGC has been required to make monthly common area maintenance (CAM) payments (*see*, CP 3763, 4691-4694, 4674).[7]

But that is not the end of the evidence of a contractual duty to maintain.

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[6] Walker Parties also argue that the complaint does not allege a section of the lease that was breached. That is not correct either. Paragraph 8 of the 2d amended complaint refers to the same section, albeit not by number (CP 2232).

[7] Is the landlord of a shopping center really contending that it has no duty to maintain the common areas of the shopping center? Does it really want prospective tenants and customers to hear this argument? Walker Parties should retract this argument.

3. The Duty to Maintain is Stated in the CCR's and Expressly Incorporated in the Lease

The very first clause, Section 1.1 of the lease provides, "The Lease is subject to all easements, restrictions, agreements of record..." (CP 3761). That should be the end of the argument.

Walker Parties contend that BGC is trying to "shoehorn" a breach of the Declaration of Covenants, Conditions and Restrictions (CCR's) and the Common Area Maintenance Agreement into a breach of lease claim. They say, "Kassab may not use the terms of a Declaration he created two years before entering into the lease with the Owners to impose common area duties ..."

This argument is wrong. It ignores the nature of CCR's. They are not merely some declaration, they are recorded (CP 4662 Clark Co. recordation stamp) and run with the land. *Thorstad v. Federal Way Water & Sewer Dist.*, 73 Wn. App. 638, 643, 870 P.2d 1046 (1994). They are a governing document for the development, in this case the Gardner Center in which the Cinema is located.

Walker Parties rely on the argument of one of the parties as if it were the holding of *Thorstad* (Resp.Br. 28). The quote at Resp.Br. 28 is the *Thorstad* Court's restatement of the argument made by the plaintiff, Thorstad. 73 Wn. App. at 642-643. The Court actually held the opposite:

> We hold that because the covenants were properly recorded by Mull before he quitclaimed part of the property to the District, the deeded property was subject to the recorded covenants.

The Court also noted:

> It is certainly possible for a party who does not execute covenants to be bound by them--for example, one who buys property with previously recorded covenants."

73 Wn. App. at 644, fn. 3.

In fact, the Court stated its holding as:

> We affirm in part and reverse in part, holding that only the portion of the property transferred to the District after the covenants were recorded is subject to the covenants.

73 Wn. App. at 639-640.

In short, *Thorstad's* holding is exactly the opposite of the proposition for which it was cited in the answering brief. The law is that the CCR's are binding on a subsequent owner who took the property after the CCR's were recorded, as the Walker Parties did.

The CCR's do not contradict the lease. They are part of it. The CCR's also provide context for interpreting section 3.2 of the lease.

Thorstadt, 73 Wn. App. at 643 is good for one more point:

> To determine contracting parties' intent, a court may consider extrinsic evidence, such as circumstances leading to execution of the agreement and conduct after execution of the agreement, to declare the meaning of what was written.

The CCR's, expressly incorporated in the lease, are a big part of the

circumstances surrounding the lease and shed light on the intent of section 3.2.[8] The landlord had a mandated duty to maintain the common areas under the lease sections 1.1, 3.2, and 4.5 (CP 3761, 3763, 3764) and the CCR's sections 1.1, 6.4[9] (CP 4665-4666, 4674). This duty, whether imposed as a reciprocal obligation to the duty to pay maintenance fees or under the duty imposed by the CCR's was part of the landlord's obligation under the lease.

And there's more. The Walker Parties were parties to the Common Area Maintenance Agreement (CP 4690-4714, signatures at 4698). It is additional evidence of the Walker Parties' intent to undertake the duty to maintain the common areas, for which they wanted to be paid under the lease and the common area maintenance agreement sections 2, 3, 4 and 7 (CP 4691-4694).

4. Common-Law Duty to Maintain

BGC Parties argued the common-law duty to maintain, not as a separate claim, but in support of the contractual duty to maintain.

Although they state it a little differently, Walker Parties agree that *Cherberg v. Peoples Nat'l Bank of Wash.*, 88 Wn.2d 595, 601, 564 P.2d 1137 (1977) holds that a landlord who retains control over common areas

[8] The CCR's were signed 6/22/2004 and recorded 6/24/2004, the lease was signed 7/6/2004 (CP 3774, 4674 (most legible recordation stamp), 4682).

[9] "Declarant" is the Gardner Center, LLC and its successors in title (CP 4666).

has a duty to maintain them.[10] Here, under the lease sections 3.2, 4.5 and 1.1 (CP 3761, 376), the common area maintenance agreement sections 2, 3, 4, 7 (CP 4691-4694) and the CCR's sections 1.1, 6.4 (CP 4665-4666, 4674) the landlord retained control and had the duty to maintain the common areas in exchange for the monthly CAM payments required under the lease.

5. The "We-Cured-It" Argument Only Illustrates the Existence of Disputed Facts

Reasonableness presents questions of fact to be resolved by trial. The arguments at pp. 32-35 of the answering brief present questions of fact on the reasonableness of the time it took to "cure" the breaches, whether the cures were reasonable, complete, satisfactory and whether there were damages in the delay period. The evidence in the record that some repairs were done, that it took nine months to complete them, that some remain incomplete (e.g. CP 2738-2740) is just evidence on the damages portion of the claims.

There is also evidence of specific failures to maintain the common areas, some of which jeopardized the health and safety of BGC's employees and customers (e.g., CP 3764-65, 4228-4236, 4180-4181, 4198). These are not undisputed facts establishing that there was no breach or that there was no damage. It was error to dismiss BGC's claims on summary judgment.

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[10] As pointed out in Resp.Br. 31, fn. 6, we erroneously cited a dissenting opinion for this proposition, although it accurately stated the law.

6. Notice

The timing and adequacy of notice (Resp.Br. 31-32) presents a question of fact for remand. There is evidence in the summary judgment record that BGC provided notice by letter, in photographs and the August 27, 2012 report by National Property Inspections identifying the maintenance and repair issues (CP 4177-4214, 4641-4642, 5432-5440).

7. Walker Parties Argue Issues Not Raised on Appeal

Without explanation, Walker Parties argue at pp. 35-36 a wetlands issue not raised by BGC. Again, at pp. 36-41 of the answering brief, Walker Parties argue issues, like constructive eviction, not raised on appeal or even pleaded. BGC does not seek to terminate the lease.

C. The Fees Awarded are Not Reasonable

Walker Parties arguments on the reasonableness of the attorney fee award are addressed in our opening brief. We adhere to the points presented there and offer only responses to new arguments raised by Respondents' brief.

1. No Assignments of Error were Waived

Walker Parties say that BGC Parties "waived the majority of his (sic) assignments of error to the trial court's findings because those assignments of error are unsupported by argument" (Resp.Br. 42). This false statement is puzzling, as Appellants' brief argued all assignments of error.

Next, Walker Parties conflate the legal standards for burden of proof with an imagined requirement to show each challenged fact is not supported by substantial evidence (Resp.Br. 42-43). But there are other challenges that may be raised in addition to a lack of substantial evidence. These include the requirement that the Court evaluate the evidence and follow the legal criteria for determining a reasonable fee (App.Br. 21-43). The Court is also required to explain how it reached its conclusions (App.Br. 20). Findings of fact must also be relevant.

The bulleted items at Resp.Br. pp. 43-44, are either irrelevant or were addressed as follows: Bullet 1 - no common core of facts was argued at App.Br. 41; Bullets 2 through 4 are irrelevant; Bullets 5 and 6 – excessive depositions and subpoenas were argued at App.Br. 23, 27, 30, 37-38; Bullet 7 – excessive electronic discovery is argued at App.Br. 37 (The question is not whether electronic discovery was reasonable, it is how much was reasonable).

Walker Parties note (Resp.Br. 45, fn. 9) that we did not object to their proposed findings of fact. But they do not tell the Court that the Parties agreed (12-3-15 RP pp. 136-137) to submit competing findings of fact and submitted detailed proposed findings and conclusions supported with citations to the evidence and authority (CP 9380-9413). The competing proposed findings served as objections.

2. Substantial Evidence

The existence of substantial evidence is not the only standard by which a trial court's award of fees is evaluated. Trial courts are required to follow certain procedures, evaluate the evidence, correctly apply legal standards and support their findings and conclusions articulated reasoning. See discussions at App.Br. pp. 20-22, 24-25, 28, 31, 40-41. This Court's review is not limited to a review for substantial evidence.

3. The Planet is a Sphere

Walker Parties once again, as in the Superior Court, sing the refrain that they were required to "prove the world was in fact round" (Resp.Br. 45) to prove the third page of the guaranty was not authentic. But they weren't. All they had to do was prove the third page was not provided to them in due diligence at the time of the sale of the Gardner Center.[11] If that were true, then the third page was not part of the guaranty contract. Game over.

But even doing it their way - proving the inauthenticity of the third page did not require Walker Parties to scorch the planet to prove it was round. Continuing the analogy, if a party actually had to prove the world

[11] The limited evidence needed to prove this point is an excellent reason, along with cost and lack of risk, not to appeal the declaratory judgment and for BGC Parties to accept the 25-year duration of the guaranty. Walker Parties' speculation that the decision not to appeal was based on other factors (Resp.Br. 2, 19, 24 fn. 5) is irrelevant and pure speculation.

was round, there are two ways to prove it. First, one could go to any number of government agencies and/or expert treatises and obtain satellite pictures showing the world is round. Or, one could do what the Walker Parties effectively did here -- find every document from the last 200 years that might bear tangentially on how we came to understand that the world was round. Each method would prove the same fact, but one method could be completed in a few days while the other would take months. However, the second method would not be reasonable or cost efficient to use.

4. Half a Million Documents

Walker Parties assert (Resp.Br. 46) that "more than 500,000 documents were produced during discovery." The statement is unsupported. Nothing remotely like that is reflected in the filings of the parties. The clerk's record consists of 9719 *pages*, not individual documents. The case involved only one commercial real estate sale and the included lease – the transaction documents and some correspondence. If by "documents," Walker Parties mean electronic files downloaded from BGC Parties' computers, that figure is grossly misleading. It would include such things as operating system files, cache files, software operating files, dll files, junk email files, pictures, videos, and all the other things that live on computers. Those of course are easily eliminated in the initial search of the downloaded data. This figure also is not even purported to represent unduplicated documents.

The only thing "complex" (Resp.Br. 46) about this case was the excessive discovery. Simple tort claims – all based on one alleged misrepresentation – and claims for breach of the lease and its guaranty are all that were pleaded and pursued.

5. Amount in Controversy

Walker Parties cite the rent schedule in the lease (CP 3057) for the proposition that $5,000,000 was at stake in this case. The amount of rent shows no such thing. There is no evidence which does. The third page at issue was a page from a guaranty, not the lease. This was a guaranty of a performing lease. The guaranty was never triggered. There was no missed rent payment (CP 4642). Elie Kassab's threat to terminate the lease was never acted upon.

A mere possibility that BGC would terminate or default is not evidence that there was any amount at stake in this case. Nor is it evidence that damages were probable.

Even if this was a case involving the termination of a lease, the rent is not the amount of damages. The landlord would have to show actual damages. The mitigation defense would require evidence of ability to find a substitute tenant, evidence of what portion of the lease would be left, and the cost to mitigate the rent loss over the remaining portion of the lease. *See, Crown Plaza Corp. v. Synapse Software Systems, Inc.*, 87 Wn. App. 495,

503-505, 962 P.2d 824 (1997). Because there was no termination, there is no such evidence. Instead of evidence, Walker Parties' brief cites portions of their attorney of record's declaration containing only argument (Resp.Br. 47, citing CP 8042 ¶ 5 and 8044 ¶ 7).

6. Walker Parties Say the Court Considered the Opposing Side's Fees; the Court Said It Didn't

The answer to this argument (Resp.Br. 50) is found in the Court's statements, "I'm not finding a lot of relevance to the Garvey Schubert fees" and "... I'll find that it has limited relevance, but you can proceed." (12-3-15 RP 79-80) These statements, combined with the absence of any mention in the opinion and order that the BGC Parties' fees were half of those sought by Walker Parties (CP 9571-9603), mean that the Superior Court did not consider the opposing side's fees. See App.Br. 28-29.

7. No Common Core of Facts Between the Two Cases

Walker Parties say, "All of the Owners' claims and counterclaims for relief centered on disproving the authenticity of the guaranty's third page" (Resp.Br. 52). But there is no allegation relating to the genuineness of the third page of the guaranty in the pleadings in the breach of lease case (CP 2231, 2289).[12] If this Court reverses the summary judgment on BGC's

[12] Of course, the reason is that the facts alleged, as a basis for the claims and counterclaims in the breach of lease case, had occurred already, and the ten-year guaranty contained in the third page had not expired. Therefore, it was irrelevant to the breach of lease allegations whether the lease was for ten years or 25.

breach of lease claims, the portion of the fees and expenses attributable to the breach of lease case must be reversed as well.

8. No ABC Rule Allows Fees to Non-Parties

LK Operating, LLC states:

> The ABC Rule is an equitable rule under which attorney fees are compensable as consequential damages in certain situations. *Blueberry Place*, 126 Wash.App. at 358, 110 P.3d 1145. The ABC Rule has three elements: " '(1) a wrongful act or omission by A ... toward B ...; (2) such act or omission exposes or involves B ... in litigation with C ...; and (3) C was not connected with the initial transaction or event ..., viz., the wrongful act or omission of A toward B.' " *Id.* at 359, 110 P.3d 1145 (quoting *Manning v. Loidhamer*, 13 Wash.App. 766, 769, 538 P.2d 136 (1975)). All three elements must be satisfied for the ABC Rule to apply. *Id.*

LK Operating, LLC v. Collection Grp., LLC, 181 Wn.2d 117, 123-24, 330 P.3d 190, 193-94 (2014). That case and the other cases relied on by Walker Parties (Resp.Br. 53-54) all involve parties to a case, not ancillary non-parties responding to subpoenas or who were witnesses at depositions. Each of the ABC cases appear to involve more than two sides.

The ABC rule is a rule of damages. It allows fees as consequential damages for wrongful conduct. *Id.* Walker Parties did not plead these third-party fees as an element of damages.

The Court in LK Operating said that part of the analysis in applying the ABC rule includes "whether the action for which attorney's fees are claimed as consequential damages is brought or defended by third persons...."

"Brought or defended" implies that the party seeking fees under the ABC rule must be a party to the action.

The third element of the ABC rule requires that the third party have no connection to the initial wrongful event. Property managers are likely to be connected to the failure to maintain claims in the breach of lease case. But there is no evidence offered by Walker Parties to establish that none of the third parties were connected to the wrongful events which led to the lawsuit.

There is also no evidence to support the claimed fees of non-parties. The billings of the three firms is not included. There is nothing defining the scope of the representation. There is no declaration from the attorneys at the three firms. The only evidence offered is in Exhibits S, T and U from the motion for fees (CP 8337-8353). These appear to be spreadsheets in the same form as the summaries offered by the firms representing the Walker Parties. We do not know their origin or from what they were created.

We adhere to the argument in the opening brief. The ABC rule is not authority for an award of ancillary third parties' fees. The contract attorney fee provisions allow an award of fees only to a prevailing party (CP 3772, section 16.7; 3794). RCW 4.84.330.

9. Expert Whipple Should be Allowed to Testify

Walker Parties admit that they had a week's notice that Expert Whipple would testify at the fee hearing. They made no effort to take discovery

about him or his opinions. Walker Parties cannot now be heard to claim prejudice.

We adhere to our discussion at App.Br. 30. Whipple alone of all three experts on both sides had actually reviewed the case file. The Superior Court criticized Expert Sand for not having reviewed the file (CP 9575). The Court should have allowed expert Whipple to testify to provide that additional foundation. The Superior Court's expressed concern with the lack of that foundation is an indication that the result may have been different if Whipple had been allowed to fully testify.

10. Expert Sand's Testimony and Evidence Not Properly Considered

We adhere to the detailed discussion at App.Br. 31-38. Expert Sand's testimony and report (in the form of a declaration) was the only evidence analyzing the time and expenses of Walker Parties' attorneys. It was an abuse of discretion to summarily reject his extensive work-up and detailed analyses without an adequate explanation. *Id.* This is especially so when the Court, at the same time, accepted the conclusory option of the opposing expert which contained no analysis.

Expert Talmadge provided legal argument and a discussion of the legal standards for fees. He did not provide an analysis of the fees and time spent by either side.

D. Fees Cannot Be Awarded in This Case Under RCW 4.84.185

1. The Case Was Not Frivolous in its Entirety

Walker parties argue that the well-established rule requiring that a case be frivolous in its entirety should not be followed because the statute was amended in 1991.[13]

Conveniently, Walker Parties overlook *Tiger Oil Corp. v. Dep't of Licensing*, 88 Wn. App. 925, 938, 946 P.2d 1235 (1997), discussed at App.Br. 40-41, 43. *Tiger Oil* was decided six years after the amendment and this Division of this Court very explicitly held, "if any one of the claims asserted was not frivolous, then the action is not frivolous." 88 Wn. App. at 938, citing *Biggs v. Vail*, 119 Wn.2d 129, 137, 830 P.2d 350 (1992). Biggs was decided the year after the amendment. *Biggs* notes that the amendment did not change the analysis to a claim-by-claim determination of frivolousness. 119 Wn.2d at 136.

Nor does consolidation of the cases defeat the requirement that the action in its entirety be frivolous. Each action contains non-frivolous claims and defenses, whether analyzed together or separately.

2. Kassab's Reasonable Belief and the Gambee Declaration

We adhere to the discussion at pp. 43-45 of the opening brief.

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[13] The 1991 legislature amended RCW 4.84.185 and a sentence, including the words "as a whole," was deleted from its language. Laws of 1991, Ch. 70.

3. The Award Under RCW 4.84.185 Was Not Necessary

Not only is the relief the same under RCW 4.84.185, the same reasonableness standard applies as it does to an award under other statutes and under contracts. The discussion (Resp.Br. 66) of *Highland School Dist. No. 203 v. Racy*, 149 Wn. App. 307, 202 P.3d 1024 (2009) omits:

> A trial judge who strays from this formula [lodestar method] will typically have a difficult time establishing that an award of attorney fees is actually reasonable. Here, the trial judge essentially followed this approach even though he did not articulate that the "lodestar" methodology was being used.

202 P.3d at 1029.

E. No More In-Camera Review on Remand

Please see App.Br. at 47-48.

[Conclusion and signatures on following page.]

Conclusion

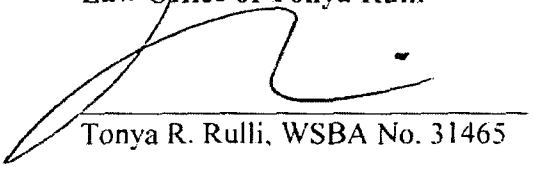
The general judgment of the Superior Court should be reversed in part. The portion of the judgment in case No. 12-2-04501-5 dismissing BGC's claims for breach of lease should be reversed and that case remanded for further proceedings. The judgment in case number 12-2-04713-1 granting declaratory relief is not challenged and should be affirmed. The supplemental judgment of the Superior Court awarding attorney fees and expenses should be reversed. Appellants should be awarded their attorney fees on appeal under RAP 18.1 and the lease.

Respectfully submitted, February 3, 2017

Montgomery W. Cobb, LLC

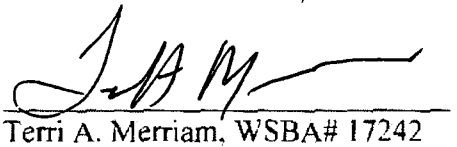
Montgomery W. Cobb, OSB# 83173, *pro hac vice*

Law Office of Tonya Rulli



Tonya R. Rulli, WSBA No. 31465

Merriam & Associates, PC



Terri A. Merriam, WSBA# 17242

attorneys for Appellants

APPENDIX
WALKER PARTIES' MIS-CITES TO RECORD

	Walker Parties' Assertions	Walker Brief Page	Court Record Page	Additional Information
1	Kassab bought several acres	p. 5	2646	Cited record does not mention acres.
2	"Kassab continued to secure long-term leases in the Gardner Center from several commercial tenants. "	p. 6	2648-51, 2695-97, 4043-81	Leases were 5 years. CP 2695-96, 4043, 4046
3	"In 2010, Kassab tries to evade a debt obligation from another personal guaranty even though neither he nor the debt collector could produce a copy of the purported release."	p. 7	no cite	Irrelevant evidence. Attempted proof of prior bad acts with no evidence.
4	"One of Kassab's loans included a $3,200 loan taken out by his consultant Ferguson's husband, Walter Chase."	pp. 7-8	2720	Record cited does not support fact. Amount not mentioned in cite.
5	"Kassab claimed the Bank had already released him from his personal guaranty."	p. 8	2723, 3318	Cited pages do not support facts, even though Kassab did claim loan officer confirmed release. CP 3320.
6	"Kassab never produced a copy of the release."	p. 8	3329	Record cited does not support factual claim.
7	"Kassab proposed to buy the loan for '50 percent on the dollar… Matrix Advisors IV agreed, and without ever producing a copy of the purported release, Kassab avoided paying the full $3,200 loan that he had personally guaranteed."	p. 8	2728-29, 3319	Incorrect statement of fact. Matrix agreed to settled for $2,000 not 50% of liability.
8	"The owners consistently and immediately 'tried to resolve everything that came up' at the Garner Center."	p. 8	3094	This is Owner testimony only, no additional evidence to support statement.
9	"By late 2011, Kassab alleged the Cinema was struggling."	p. 9	3406-07	CP 3406-07 is a profit and loss showing $193,000 loss. So "struggling" is not alleged.
10	"The statements that were produced showed a 'sizeable case balance' of $1.4 million."	p. 9	3391, 3399	Fails to mention that the P&L showed a loss.
11	"In May 2012, Kassab demanded $120,000 rent concessions and notified the Owners of alleged maintenance concerns."	p. 9	3403-04	Implies that notice of maintenance concerns was in May 2012, but cited record indicates that Walker had prior knowledge.

APPENDIX
WALKER PARTIES' MIS-CITES TO RECORD

12	"By June 2012, Kassab had still refused to turn over his personal financials."	p. 10	3413	Actually record has Kassab saying they already have his financial information. No mention of "personal."
13	Notice of problems with garbage	p. 10	4117-24	Respondents' fail to state that photos were also provided.
14	"Michelle Estep promptly communicated with the restaurant and the Cinema to remedy the problem."	p. 10 - 11	4110-11	No evidence of "promptly." Respondents use a 7/25/2012 email as evidence of response to a 7/30/2012 email complaint. Also, only evidence supporting statement is Estep's email to the restaurant asking them to fix things. No other evidence of action.
15	"The Owners continued their efforts to remedy the Cinema's alleged garbage and maintenance issues."	p. 11	4125-26	Record cited does not support factual statement. Just another email stream. Note it begins 8/2/2012, which is contrary to the "promptly" language. Note that 9/6/2012 email is from a waste reduction specialist and confirms that there is a problem, i.e., not "alleged."
16	"for the first time"	p. 11	2735, 3290, 3579	Record cites do not support any timeline
17	"One month after the Owners told Kassab they would hold him liable on his personal guaranty for the full lease term, Kassab disclosed for the first time a purported third page to the guaranty limited his personal obligation under the leas to 10 years."	p. 11	3443, 3589	Record cites do not support any of the timeline statements or even that the 3 page guarantee was attached to one of the cited emails.
18	"Kassab refused."	p. 12	1600	Citation is to Walker Parties complaint. Not evidence.
19	"In September 2012, Kassab told the Owners that he would terminate his lease over public health and safety allegations."	p. 12	3425-27, 4227	CP 3425-27 is Walker Parties' complaint. Not evidence. CP 4227 is an email from Coldwell Banker Commercial Bob Bernhardt saying Kassab made statement. Statement is hearsay.
20	"This news came as an 'absolute shock and surprise' to the Owners."	p. 12	3095	Testimony concerns "shocked and surprise" that Steve Horenstein, an attorney, claims there were serious problems with maintenance. Record cite does not support fact.
21	"The Owners assured Kassab that the were actively addressing the garbage-related issues."	p. 12	3589	Owner letter to Horenstein. No associated evidence to support fact.

APPENDIX
WALKER PARTIES' MIS-CITES TO RECORD

22	Sidewalk and curb issues	p. 12	2581, 2584	Record cite actually confirms that there were real problems.
23	"Property manager Estep testified in deposition that a color copy of the 'original' lease that her office kept included a two-page guaranty signed by Kassab."	p. 13	2845	No foundation for why Estep would know if she had the "original" lease
24	"An employee at Matrix Advisors IV testified in deposition that his company generally does not generate correspondence."	p. 13	3292	No foundation on who the employee is and why he is qualified to answer question.
25	"Although, the letter purportedly sent by 'Sharon' referred to ' Matrix Advisors,' no 'Sharon' worked at Matrix Advisors IV in August 2012."	p. 13	3299-3301	No foundation on who the employee is and why he is qualified to answer question. We do not know if company has 3 employees or thousands. Statement also misstates testimony. Witness repeatedly stated he was not certain and initial testimony was that Sharon worked at Matrix either in 2012 or 2013.
26	"The entity's official names is 'Matrix Advisors IV, LLC' -- not "Matrix Advisor' as used in the August 2012 letter."	p. 13	no record cite	No record cite to support this statement.
27	"A copy of the 'Sharon' letter was not in Matrix Advisor IV's files."	p. 13	3291	No foundation on who the employee is and why he is qualified to answer question. Also misstates evidence as witness testified that he did not see all 1,200 pages of what was produced by Matrix.
28	"If Matrix Advisors IV did generate correspondence, it would have been dated and on Matrix Advisors IV letterhead."	p. 13	3291-94	No foundation on who the employee is and why he is qualified to answer question. Ignores contrary testimony where witness states that he has never seen a letter generated by Matrix. CP 3292 & 3294. Also, that witness is "assuming" what the letterhead would look like. CP 3293.

APPENDIX
WALKER PARTIES' MIS-CITES TO RECORD

29	"The employee did not believe the 'Sharon' letter came from Matrix Advisors IV or any other affiliated entity."	p. 13	3312-3314	No foundation on who the employee is and why he is qualified to answer question.
30	"The Owners sought numerous times to inspect the original documents to no avail."	p. 16	4470	Not evidence. CP 4470 is to Walker Parties' motion to compel.
31	In February 2013, Kassab produced about 2,000 pages of responsive documents but indicated that all relevant electronically-stored information (ESI) had been 'destroyed.'"	p. 17	8111, ¶ 12	Citation is to Walker Parties' attorney (Olsen) declaration. Only information in Olsen's personal knowledge is valid evidence. All statements made by others are hearsay.
32	"The electronic discovery recovered from Kassab's computers revealed no indication that the guaranty's third page existed before 2012."	p. 18	8113, ¶ 19	Citation is to Walker Parties' attorney (Olsen) declaration. All hearsay. No evidence or statement from the forensic consultant, Epiq.
33	"That determination was expressly based on a finding that the third page of the guaranty had been forged."	23	9578	No use of "fraud" or "forged" on cited record page.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Reply Brief of Appellants upon:

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DATED this 3rd day of February, 2017

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